

***United States Court of Appeals
for the Second Circuit***



APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

PLEASE RETURN TO
RECORDS ROOM

Louis Teplitsky
2136 Wallace Ave.
Bronx, NY 10462

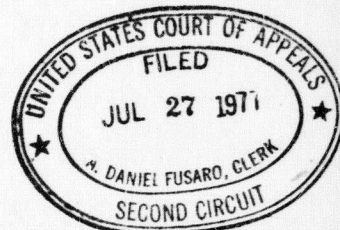
LOUIS TEPLITSKY,

Plaintiff-Appellant,

- against -

BUREAU OF COMPENSATION,
UNITED STATES DEPARTMENT OF LABOR,
and UNITED STATES OF AMERICA,

Defendants-Appellees.



DOCKET

77-6094

77-6094

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PART I — DOCKET SHEET — COURT JUDGMENTS

- 2 — U.S. HOSPITAL MEDICAL REPORTS
- 3 — SUMMONS AND RESPONSE-DEFAULT
- 4 — AFFIDAVITS U.S. BUREAU-VETERANS ADM.
- 5 — FRAUD AND PERJURY-DOCUMENTATION
- 6 — MEDICAL EVIDENCE-SERIES NO: ONE
- 7 — U.S. CHIEF SURGEON-DIAGNOSIS
- 8 — U.S. BUREAU DOCUMENTATION
- 9 — MEDICAL EVIDENCE-NO: 2-SERIES
- 10 — MAJOR WITNES-CHANGED TESTIMONY (U.A.)
- 11 — APPELLANT'S ATTORNEY TESTIMONY
- 12 — MEDICAL EVIDENCE-NO: 3-SERIES
- 13 — U.A. CHECKS NOT CASHED DUE TO THREATS

PAGINATION AS IN ORIGINAL COPY

JUDGE BRODERICK

100-1 70 1001 04 22 70 2 000 1 5 000 0806

PLAINTIFFS

LOUIS TEPLITSKY

DEFENDANTS

BUREAU OF COMPENSTATION, U.S.
DEPARTMENT OF LABOR

CAUSE

personal injury; hurt on job as a mail handler; review
decision from the administrative agency

sls

ATTORNEYS

Louis Teplitsky, Pro Se
2136 Wallace Ave.
Bx, NY 10462 TA-8-6072

☒ CHECK
HERE
IF CASE WAS
FILED IN
FORMA
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DATE
APR 22 1976

FILING FEES PAID
RECEIPT NUMBER

IFP

C.D. NUMBER

STATISTICAL CARDS

CARD DATE MAILED
JS 5 X
JS 6

DATE	NR.	JUDGE BRODERICK	PROCEEDINGS
4-22-76	1	Filed order permitting pltf. to proceed in forma pauperis without prepayment of costs or fees. Edlestein, J.	
4-22-76	2	Filed complaint and issued summons.	and 72 CIV 2469
05-05-76	3	Filed pltf's/for an order that action 67 Civ 1019/be brought from the storage to the court, etc.	
05-19-76	4	Filed summons and Marshals return - served Bureau of Compensation US Dept. of Labor on 5-6-76 by M. Greeberg Atty. Gen'l Dept. of Justice, Wash., DC by cert. mail #233153, 5-12-76	
05-07-76	=	Filed memo endorsed on motion #3: Motion granted. 67 CIV 1019 to be obtained from the FRC. 72 CIV 2469 to be available in the closed record section of the District Court as soon as this record is returned from the USCA. So ordered. - Werker, J. m/n by pro-se Clerk. (copy of this memo to Mrs. Fugnetti - closed record section)	
07-14-76	5	Filed by plaintiff 1 bundle of documents containing: motion to amend complaint motion to be assigned an attorney motion for open court trial motion to investigate Judge MacMahon's conduct affdvt. motion notice date - oral argument and 17 exhibits.	
7-13-76	6	Filed by deft. USA - affdvt. and notice of motion for judgment dismissal in complaint purs. to rules 12 and 56. - ret. 8-2-76	
7-13-76	7	Filed deft. USA's memorandum in support of #6.	
7-16-76	8	Filed defts. notice of motion to dismiss for failure to state a claim ret. 7-26-76	
16-76	9	Filed pltf's. memorandum of law.	
20-76	10	Filed defn pltf's. affdvt. and notice of motion to appoint a 3 judge doctor team to examine pltf, etc. ret. on: Aug. 9, 1976 at 10am in Rm. 618.	
20-76	11	Filed pltf's. memorandum of law.	
8-11-76	12	Filed plaintiffs notice of motion for compensation. - ret. 8-30-76.	
8-23-76	13	Filed pltf's notice of motion to compel deft. to submit to Court cancelled checks, etc. -- ret. 9-13-76	
8-23-76	14	Filed plaintiffs memorandum in support of above (No.13)	
8-23-76	15	Filed plaintiffs documents containing 3 motions for default, for an order that pltf. be paid interest and for an order that the US Atty. submit to the court cancelled checks - exhibits included in documents. - ret. 8-23-76	
8-23-76	16	Filed plaintiffs memorandum in support of No.15.	
8-23-76	17	Filed plaintiffs memorandum.	
9-10-76	18	Filed pltf's notice of motion for an order that the Court re-schedule 3 motions, etc. -- ret. 9-27-76 (re entry #15)	
9-10-76	19	Filed pltf's notice of motion for an order of expunction of pltf's arrest - ret. 9-27-76	
9-13-76	=	Filed memo endorsed on pltf's motion-document #18: Motion denied. The motions referred to have been docketed and are presently located in my chambers. So ordered. - Werker, J. m/n (mailed copy to pltf.)	
01-76	20	Filed notice of reassignment to Judge Broderick.	

Continued on page # 3

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
12-7-76	Pl. Pltff's Memo for Clarification.
12-7-76	Fld Pltff's Motion for Priority calendar action etc....ret 12-27-76.
12-8-77	Fld Pltff Memorandum Re: Character etc.
2-10-77	Fld Pltff's Motion for an order for pltff to continue to receive treatment from U.S. Public Health Host...etc....ret 2-4-77-Rm 519.
2-10-77	Fld Pltff's Affdvt to be treated equal. etc..
2-10-77	Fld Pltff's Memorandum for review of his 15 Doctors Reports etc...
2-15-77	Fld Pltff Memorandum for information...reasons.
2-3-77	PRE-TRIAL CONFERENCE HELD BY JUDGE BRODERICK
2-26-77	Fld Pltff Memorandum Re: Medical-White House-Congressional-Exhibits.
5-25-77	Fld Memorandum Order.....I dismiss the complt herein on grounds of res judicata. Pltff's cross motion and other motions are denied as mooted by the disposition of the complt.So Ordered....Broderick, J. mn/copy
5-26-77	Fld Judgment....Order that debts Bureau of Compensation, U.S. Dept. of Lab or and U.S. of A. have judgment against pltff L. Teplitsky dismissing the complt.'Clerk-5-26-77.
6-3-77	Fld Pltff's Affdvt & Motion for reconsideration of case..etc.ret 6-24-77.
6-6-77	Fld Pltff's Notice of Appeal to USCA.....from order ent 5-26-77. copy mailed on 6-6-77 to:Warren Schneider Esq of Adm & Ship Sec of U.S.Depty of Justice-26 Fed Plaza NYC .

UNITED STATES DISTRICT COURT

CHAMBERS OF
JUDGE HENRY F. WERKER
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

June 18, 1976

Mr. Louis Teplitsky
2136 Wallace Avenue
Bronx, New York 10462

Re: Teplitsky v. Bureau of Compensation, 76 Civ. 1831 (HFV)

Dear Mr. Teplitsky:

Judge Werker has asked me to advise you that he has granted your motion filed May 5, 1976 requesting that the files from cases 67 Civ. 1019 and 72 Civ. 2469 be held at the United States Courthouse throughout the duration of your present action.

The records of 67 Civ. 1019 are currently in Judge Werker's chambers. The records of 72 Civ. 2469 have been requisitioned from the Federal Records Center in Bayonne, New Jersey and should be available shortly. We will inform you of their arrival when we receive them.

Very truly yours,

Louise S. Goldberg

Louise S. Goldberg
Law Clerk to
Judge Henry F. Werker

Copy to: Stuart Parker, Esq.
Assistant United States Attorney
United States Courthouse Annex
1 St. Andrew's Plaza
New York, New York 10007

UNITED STATES DISTRICT COURT

CHAMBERS OF
JUDGE HENRY F. WERKER
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

September 15, 1976

Mr. Louis Teplitsky
2136 Wallace Avenue
Bronx, New York 10462

Re: Louis Teplitsky v. U.S. Bureau Dept. of Labor, 76 Civ. 1831

Dear Mr. Teplitsky:

Judge Werker has received your motion which was delivered to chambers on September 14, 1976 requesting the re-scheduling of motions which were previously filed but which you indicate were never docketed. Please be advised that these motions have indeed been docketed, and that they are presently in Judge Werker's chambers. These motions will be determined as soon as the court is able to get to them.

Very truly yours,

Louise Goldberg Kerner

Louise Goldberg Kerner
Law Clerk to
Judge Henry F. Werker

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 1831 V.L.B.

Louis Teplitsky
- v. -

ORDER FOR INITIAL
PRE-TRIAL CONFERENCE

*Bureau of Compensation, U.S.
Dept. of Labor*

The case listed above having been assigned to me for all purposes, including trial, the attorneys for all parties shall appear in Room 519 United States Courthouse, Foley Square, at 2:30 P.M. on Feb. 3, 1977, to set a schedule for completing preparation for trial and to fix trial dates.

Counsel for plaintiff are directed to mail copies of this Order to all other counsel of record at once, and to confirm in writing that they have done so to my chambers, Room 654.

If this action has been settled or otherwise terminated, counsel are directed to file a stipulation of discontinuance, voluntary dismissal, or other proof of termination of the action prior to the date of the pre-trial conference with the Clerk's Office, Orders and Appeal Section, U. S. Courthouse, Foley Square, New York, New York 10007; otherwise counsel are directed to appear as specified above.

If issue has not been joined but plaintiff(s)' counsel is aware of the identity of defendant(s)' counsel, plaintiff(s)' counsel is directed to mail a copy of this Order to defendant(s)' counsel forthwith. If plaintiff(s)' counsel has been negotiating with adjusters or other agents for the defendant(s), he should advise them that unless an answer or an appearance has been filed by the date of the conference, he will be compelled to appear at that time with a motion for a default judgment.

Failure to obtain an appearance from a defendant who has been served, or to appear with a motion for a default judgment, may result in the dismissal of the action for failure to prosecute. If process has not yet been served upon the defendant(s), the Court may, depending upon the circumstances, place the case on the Suspense Calendar or take appropriate steps otherwise to terminate the action.

Dated: New York, New York

Jan. 26, 1977

V.L.B.

Vincent L. Broderick, U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FIELD

MAY 25-1977
S.D.C. N.Y.

-----X
LOUIS TEPLITSKY,

Plaintiff,

-against-

BUREAU OF COMPENSATION, U.S. DEPT.
OF LABOR, and UNITED STATES OF AMERICA,

Defendants.
-----X

: 76 Civ. 1831
(VLB)

: MEMORANDUM ORDER

VINCENT L. BRODERICK, U.S.D.J.

Plaintiff Louis Teplitsky, a pro se litigant, is a veteran of World War II who was discharged from the war with a 50% psychiatric disability. In 1963, as a result of this disability, he was receiving \$107.00 per month in veteran's benefits. In December, 1963, while employed in the United States Post Office, the plaintiff suffered a groin injury, for which he was eventually declared to be 100% disabled by both the Veteran's Administration ("V.A.") and the Bureau of Employees Compensation ("B.E.C.").

Plaintiff was required by statute, 5 U.S.C. §8116, to elect between the benefit to which he was entitled from the B.E.C. of \$209.99 per month plus the \$107.00 per month which he was receiving from the V.A. prior to the groin injury, and the \$250.00 per month which would represent 100% disability from the V.A.

Although plaintiff has consistently refused to make such an election, since 1965 he has received 100% disability payments from the V.A. He has not received any payments from the B.E.C. since 1965 because the B.E.C. determined that since plaintiff was receiving 100% benefits from the V.A., he was not entitled to an additional award for the same disability.

Plaintiff contends that he is entitled to full benefits from both agencies. In order to avoid any apparent election on his part, he has refused to cash his checks from the V.A. Plaintiff's complaint seeks review by this Court of the determination by the B.E.C. denying him disability benefits from that agency. The complaint further alleges that the plaintiff now has "newly discovered evidence" which was not available at the time of a prior lawsuit between the parties. Specifically, he refers the Court to determination by the V.A. rendered September 18, 1973 that plaintiff's World War II psychiatric disability was directly attributable to his military service.

The Government has moved to dismiss the complaint pursuant to Rules 12(b)(1) and 56 of the Federal Rules of Civil Procedure on the ground that the identical issues raised in this action were fully litigated in the prior lawsuit between the parties. The Government also seeks dismissal pursuant

to 28 U.S.C. §1915(d) on the ground that the action is frivolous. Plaintiff has cross-moved for an order granting him benefits from both agencies.

By reference to the decision by Judge MacMahon in a prior lawsuit between the parties, Teplitsky v. Bureau of Compensation, 288 F.Supp. 310 (S.D.N.Y.), aff'd., 398 F.2d 820 (2d Cir.), cert. denied 393 U.S. 343 (1968), it becomes clear that plaintiff seeks here the same relief that he sought in the action before Judge MacMahon. Judge MacMahon held as a matter of law that awards made by the B.E.C. under the Federal Employees Compensation Act, 5 U.S.C. §§8101-8150, are not subject to judicial review, and dismissed the complaint for lack of jurisdiction over the subject matter. The Court of Appeals affirmed Judge MacMahon's order for essentially the same reasons. In a subsequent action, 72 Civ. 2469, Judge MacMahon made a similar finding and dismissed the complaint as frivolous pursuant to 28 U.S.C. §1915(d).

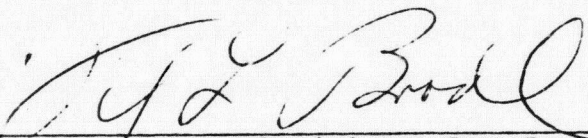
Principles of res judicata mandate a termination of this litigation. As the Court of Appeals observed in Sanchez v. Carribean Carriers Ltd., Dckt. No. 76-7213, slip. op. 2569 at 2572-3 (2d Cir. March 30, 1977):

The doctrine of res judicata is primarily grounded on a public policy determination which "dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522, 525 (1931).

Principles of res judicata have been held to be applicable to questions of jurisdiction. See Sanchez v. Carribean Carriers Ltd., supra at 2573. The issue of subject matter jurisdiction was fully litigated in the prior action between the parties hereto. Plaintiff's "newly discovered evidence" does not remedy this court's lack of jurisdiction.

I dismiss the complaint herein on grounds of res judicata. Plaintiff's cross-motion and other motions are denied as mooted by the disposition of the complaint.¹

SO ORDERED.



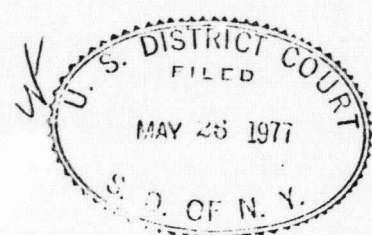
Vincent L. Broderick, U.S.D.J.

May 24, 1977

FOOTNOTES

1. Although not raised in his complaint, plaintiff's numerous motions allege both a criminal conspiracy to deprive him of his rights and a denial of benefits to him because of anti-semitic discrimination. Had these allegations been raised in the complaint, principles of res judicata would have also required their dismissal since the issues were determined in Judge MacMahon's decision reported at 288 F.Supp. 310 (criminal conspiracy) and in a memorandum decision dated April 10, 1973 in 72 Civ. 2468 (discrimination).

Broderick, J.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
LOUIS TEPLITSKY

76 Civil 1831 (VLB)

Plaintiff :

-against- :

BUREAU OF COMPENSATION, U.S. DEPT. : JUDGMENT
OF LABOR, and UNITED STATES OF AMERICA :

Defendants
----- X

Defendants having moved the Court pursuant to Rules 12(b)(1) and 56, of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Vincent L. Broderick, United States District Judge, and the Court thereafter on May 25, 1977, having handed down its memorandum decision dismissing the complaint, and the Court having denied plaintiff's cross-motion and other motions as mooted by the disposition of the complaint, it is,

ORDERED, ADJUDGED and DECREED: That defendants BUREAU OF COMPENSATION, U.S. DEPT. OF LABOR and UNITED STATES OF AMERICA have judgment against plaintiff LOUIS TEPLITSKY dismissing the complaint.

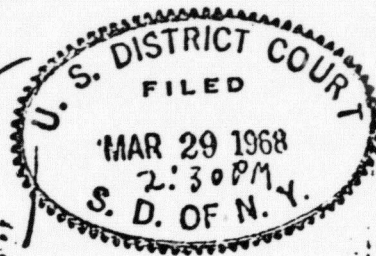
Dated: New York, N.Y.
May 26, 1977

[Signature]
Clerk

PART-IV.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(72)



-----X
LOUIS TEPLITSKY,

Plaintiff,

-against-

BUREAU OF COMPENSATION
U. S. DEPARTMENT OF LABOR

-and-

UNITED STATES OF AMERICA,

Defendants.
-----X

MEMORANDUM

#34602

MacMAHON, District Judge.

The government moves for summary judgment under Rule 56, Fed. R. Civ. P., dismissing the complaint and for a declaratory judgment, 28 U.S.C. § 2201, that plaintiff elect which of two government disability awards he will receive in the future.

The court has carefully read through all of plaintiff's extensive pleadings, papers and exhibits. It appears from these papers that plaintiff was employed in the United States Post Office in New York City as a temporary mail handler in December 1963. While employed there, he suffered a pain in the left : : area of

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MAR 29 1968

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his groin. Plaintiff was examined and found fit for light duty. He continued to work in this capacity, but the pain recurred in January and February 1964. The Bureau of Employees' Compensation (B.E.C.) determined after physical examination by the Public Health Service that this was a job-related physical injury and paid plaintiff total physical disability benefits from March 1964 until November 1964. In November 1964, the benefits were reduced from total to partial and paid on this basis until June 1965, at which time they were discontinued. At the same time that he was receiving these benefits, plaintiff, as a World War II veteran, also received benefits from the Veterans Administration on a 50% disability rating due to a nervous disorder.

Plaintiff protested both the reduction and the discontinuance of his physical disability benefits. B.E.C. reopened the case, at plaintiff's request, in November 1965. After voluminous correspondence and extensive physical and psychiatric examination by the Public Health Service and private consultants, hired for the purpose of examination, B.E.C. denied plaintiff's request for continued physical disability benefits in December 1966. (B.E.C. did find that the physical injury

at the Post Office aggravated his prior nervous condition and that the nervous condition was totally disabling. On this basis, B.E.C. awarded 100% disability benefits retroactive from November 1964, the time when total physical disability benefits were discontinued, to September 1965.

In October 1965, plaintiff applied for and received from the Veterans Administration an increase in his disability rating from 50% to 100% due to a nervous disorder. The award was retroactive to September 1965. B.E.C. determined that its December 1966 award was for the same disability as the Veterans Administration award. To avoid duplicate awards for the same disability, B.E.C. terminated its retroactive award in September 1965. From September 1965 to date, plaintiff has received only the Veterans Administration award. He remains eligible, however, to receive benefits under either award.

Plaintiff seeks damages in the amount of \$2,400,000 from B.E.C., the United States Post Office, and the United States Public Health Service. He also seeks a review of the B.E.C. award. He alleges that

the government agencies were criminally negligent in their physical examination, that the same agencies conspired against him, that the agencies were extremely cruel, and that the agencies defamed him.

There are many factual disputes which would demand trial, if there were some legal relief for the wrongs which plaintiff alleges. But it is well settled that awards made by B.E.C. under the Federal Employees Compensation Act (F.E.C.A.), 5 U.S.C. §§ 8101-8150, are not subject to judicial review. Blanc v. United States, 244 F.2d 708 (2 Cir. 1957). The court is without jurisdiction to inquire into the award made by B.E.C.

As to the allegations of criminal negligence, conspiracy, cruelty, and defamation allegedly suffered by plaintiff as a government employee, the F.E.C.A. is "exclusive and instead of all other liability." 5 U.S.C. § 8116(c). Plaintiff must find his remedy within the Act. Granade v. United States, 356 F.2d 837 (2 Cir. 1966). Having presented his allegations to the B.E.C., the agency which congress empowered to administer the F.E.C.A., he must abide by that agency's findings.

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Even if the alleged wrongs to plaintiff did not arise in the course of his government employment, he would still have no legal remedy for the wrongs which he alleges. The government can be sued only in accordance with its consent given in the Federal Tort Claims Act, 28 U.S.C. § 1346(b). Dalehite v. United States, 346 U.S. 15 (1953). Although plaintiff characterizes his allegations as criminal negligence, conspiracy, cruelty, and defamation, their substance is that B.E.C. refused in its discretion to believe his statement that he had a permanent physical disability and found instead that he had a 100% disability due to a nervous disorder. All of the allegations fall outside of the government's consent to suit. The government cannot be sued for wrongs arising from the exercise of discretion vested in an agency and for claims based on libel and slander. 28 U.S.C. § 2680(a)(h). Since the government has not consented to suit, plaintiff's action is futile. Blitz v. Boog, 328 F.2d 596 (2 Cir. 1964).

It is clear that there is no legal basis for relief. The claims which plaintiff makes have all been presented to and ruled upon by the B.E.C., the award of the B.E.C. is not subject to judicial review, and the

government has not consented to suit under the Federal Tort Claims Act for the wrongs which plaintiff alleges. The government is entitled to judgment as a matter of law. Accordingly, the motion for summary judgment dismissing the complaint is granted.

The government seeks a declaratory judgment that plaintiff must make an election between the Veterans Administration award and the B.E.C. award. The government is entitled to bring an action under the Declaratory Judgments Act, 28 U.S.C. § 2201. Public Utilities Comm'n of California v. United States, 355 U.S. 534 (1958). The court finds that there is an "actual controversy" because plaintiff has refused to make an election between the benefits he is to receive.

Congress has the authority to establish the conditions under which awards will be made pursuant to the F.E.C.A. One of the conditions is that "an individual entitled to benefits . . . because of his injury, . . . who also is entitled to receive . . . payments or benefits for that injury . . . because of service by him . . . in the armed forces, shall elect which benefits he will receive." 5 U.S.C. § 8116(b). We have already

held that the determination by B.E.C. that plaintiff is entitled to a 100% disability rating due to a nervous disorder is not reviewable here. It is undisputed that the Veterans Administration also has made an award for the same disability. The terms of the statute require plaintiff to make an election.

Plaintiff must make an election, in writing, whether to receive benefits under the Veterans Administration Act, amounting to \$250.00 per month, or under the F.E.C.A., amounting to \$209.99 per month. This election must be made within twenty (20) days of the filing of this memorandum.

The government's motion for summary judgment is granted, and the Clerk of the court is directed to enter judgment dismissing the complaint. The government's motion for a declaratory judgment is granted. Plaintiff must make his election, in writing, within twenty (20) days of the filing of this memorandum.

So ordered.

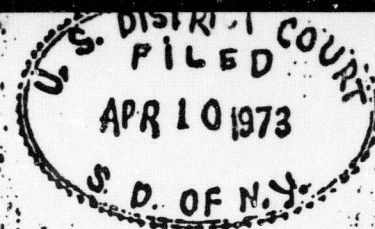
Dated: New York, N. Y.

March 29, 1968

Lord & Mac Mahon
U. S. D. J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----x
LOUIS TEPLITSKY,

Plaintiff,

Pro Se
72 Civ. 2469-LFM

-against-

MEMORANDUM

U.S. BUREAU OF COMPENSATION,
DEPARTMENT OF LABOR,
UNITED STATES OF AMERICA,

Defendants.

-----x

MacMAHON, District Judge.

Plaintiff pro se moves this court for leave to amend his complaint and for assignment of counsel. His petition to proceed in forma pauperis was granted on June 8, 1972. The motion to amend is granted, the motion for assignment of counsel is denied, and the complaint is dismissed pursuant to 28 U.S.C. § 1915(d).

Plaintiff alleges that he is being denied disability compensation from the Bureau of Employees' Compensation ("B.E.C.") solely because he is Jewish. Defendants have filed an answer. Plaintiff's amended

complaint does not alter or add any claims. However, we shall permit amendment in order to allow plaintiff every opportunity to present his claims as completely as possible.

Plaintiff is a veteran who was discharged during World War II with a 50% psychiatric disability. Since his discharge, plaintiff has received disability compensation. While a temporary worker in the United States Post Office in New York City in December 1963, plaintiff suffered a strain in the left inguinal area. Although plaintiff complained of great pain, he was declared fit for duty until March 8, 1964 when he was found to be physically disabled. He received total disability payments from March 8, 1964 through November 9, 1964 from the B.E.C. His disability rating was reduced to partial physical disability on November 10, 1964. Ten months later, the Veterans Administration ("V.A.") re-examined plaintiff's psychiatric disability and determined that he qualified for increased benefits as 100% psychiatrically disabled. Shortly thereafter, the B.E.C. likewise determined that plaintiff was 100% psychiatrically disabled.

Plaintiff, thus, is now considered to be 100% psychiatrically disabled by both the B.E.C. and the V.A. Since a person is entitled to receive payments from only one government agency for any one disability, plaintiff was told that he must elect to receive either the V.A. award or the B.E.C. award. 5 U.S.C. § 8116.

Plaintiff has received his V.A. award each month but has refused to make use of it. He fears that an election of awards will be viewed as an admission of a false claim for compensation from the B.E.C. Plaintiff need not worry. His papers make clear that he has great integrity. The election is required by statute and carries no implications with respect to the validity of his claim.

Plaintiff, in a previous action, claimed that he was entitled to receive both awards and sought a review by this court of the B.E.C.'s determination of psychiatric disability. We held that we lacked jurisdiction to review the awards of the B.E.C. and that plaintiff must elect to receive either the V.A. or the B.E.C. award. Teplitsky v. Bureau of Compensation, 288 F. Supp. 310 (S.D.N.Y.), modified as to the amount of the V.A.

award, 398 F.2d 820 (2d Cir.), cert. denied, 393 U.S. 943 (1968). Later, plaintiff moved for an order relieving him of that judgment and directing the B.E.C. to pay him 100% physical disability. We denied that motion because, again, this court does not have jurisdiction to review determinations of the B.E.C. Teplitsky v. Bureau of Compensation, 67 Civ. 1019 (S.D.N.Y., filed Feb. 9, 1970). On April 3, 1972, we denied plaintiff's motion for reargument of our decision of March 28, 1968. Tep-litsky v. Bureau of Compensation, 67 Civ. 1019 (S.D.N.Y., Endorsement filed Apr. 4, 1972).

Plaintiff's "chief complaint" here is that he has been denied his disability compensation from the B.E.C. because he is Jewish. Plaintiff has been both the subject of and a witness to anti-Semitic persecution. As a child in the Ukraine, he was beaten and mocked. His mother and grandfather were killed in a pogrom. His father, brother and many close relations were exterminated by the Nazis. No doubt, these tragic events have had a continuing effect on plaintiff. They do not, however, constitute a basis for a finding of discrimination here. Plaintiff provides us with no facts upon which a finding of discrimination on the

part of these defendants could be based. Since the amended complaint fails to allege any facts which might support plaintiff's claim of discrimination, we are compelled to dismiss this part of the claim pursuant to 28 U.S.C. § 1915(d). Lubin v. Midtown Hospital, 70 Civ. 1460 (S.D.N.Y., dated Dec. 6, 1972); Argentine v. McGinnis, 311 F. Supp. 134 (S.D.N.Y. 1969).

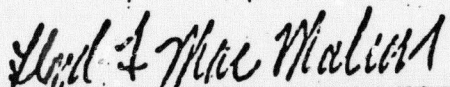
Insofar as plaintiff claims a right to be paid 100% physical disability from the B.E.C., we dismiss that claim, once again, on the ground that this court does not have jurisdiction to review determinations of the B.E.C. See Toplitsky v. Bureau of Compensation, supra.

Since the amended complaint has been dismissed, there is no reason to grant the motion for assignment of counsel. Accordingly, the motion for leave to amend the complaint is granted, the motion for assignment of counsel is denied, and the complaint is dismissed.

So ordered.

Dated: New York, N. Y.

April 10, 1973


LLOYD F. MACMAHON
United States District Judge

5 U.S.C. § 8116. LIMITATIONS ON RIGHT TO RECEIVE
COMPENSATION

(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except -

(1) in return for service actually performed;

and

(2) pension for service in the Army, Navy, or Air Force.

However, eligibility for or receipt of benefits under subchapter III of chapter 83 of this title does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107 (c) of this title.

(b) An individual entitled to benefits under this subchapter because of his injury, or because of the death of an employee, who also is entitled to receive from the United States under a provision of statute other than this subchapter payments or benefits for that injury or death (except proceeds of an insurance policy), because of service by him (or in the case of death, by the deceased) as an employee or in the armed forces, shall elect which benefits he will receive. The individual shall make the election within 1 year after the injury or death or within a further time allowed for good cause by the Secretary of Labor. The election when made is irrevocable, except as otherwise provided by statute.

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

5 § 8110 GOVERNMENT ORGANIZATION

1974 Amendment. Subsec. (a) of Pub. L. 93-416 substituted "provision of subpart (A), (B), and (C) for disability dependent on the employee for the part because of his own payment of medical disability".

Effective Date of 1974 Amendment. Amendment by Pub. L. 93-416 effective Sept. 7, 1974, and applicable to any in-

jury or death occurring on or after such effective date, see section 23(a) of Pub. L. 93-416, set out as a note under section 8101 of this title.

Legislative History. For legislative history and purpose of Pub. L. 93-416, see 1974 U.S. Code Cong. and Adm. News, p. 5341.

§ 8111. Additional compensation for services of attendants or vocational rehabilitation

(a) The Secretary of Labor may pay an employee who has been awarded compensation an additional sum of not more than \$500 a month, as the Secretary considers necessary, when the Secretary finds that the service of an attendant is necessary constantly because the employee is totally blind, or has lost the use of both hands or both feet, or is paralyzed and unable to walk, or because of other disability resulting from the injury making him so helpless as to require constant attendance.

(b) The Secretary may pay an individual undergoing vocational rehabilitation under section 8104 of this title additional compensation necessary for his maintenance, but not to exceed \$200 a month.

As amended Pub. L. 93-416, § 7, Sept. 7, 1974, 88 Stat. 1145.

1974 Amendment. Subsec. (a) of Pub. L. 93-416, § 7(a), substituted "500" for "300".

Subsec. (b) of Pub. L. 93-416, § 7(b), substituted "200" for "100".

Effective Date of 1974 Amendment. Amendment by Pub. L. 93-416 applicable to cases where the injury or death occurred prior to Sept. 7, 1974, but only to

a period beginning on or after Sept. 7, 1974, see section 23(a) of Pub. L. 93-416, set out as a note under section 8101 of this title.

Legislative History. For legislative history and purpose of Pub. L. 93-416, see 1974 U.S. Code Cong. and Adm. News, p. 5341.

§ 8112. Increase or decrease of basic compensation

(a) If an individual—

(1) was a minor or employed in a learner's capacity at the time of injury; and

(2) was not physically or mentally handicapped before the injury; the Secretary of Labor, on review under section 8128 of this title after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity.

(b) If an individual without good cause fails to apply for an undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, on review under section 8128 of this title and after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.

As amended Pub. L. 93-416, § 8(a), Sept. 7, 1974, 88 Stat. 1145.

1974 Amendment. Subsec. (a) of Pub. L. 93-416 redesignated former subsec. (a) as (b), former subsec. (b) as (c), and added the Secretary to prospectively recompute compensation because of decrease in wage-earning power after an increase from injury was required.

Subsec. (b) of Pub. L. 93-416 redesignated former subsec. (c) as (a).

Effective Date of 1974 Amendment. Amendment by Pub. L. 93-416 applicable

to cases where the injury or death occurred prior to Sept. 7, 1974, but only to a period beginning on or after Sept. 7, 1974, see section 23(a) of Pub. L. 93-416, set out as a note under section 8101 of this title.

Legislative History. For legislative history and purpose of Pub. L. 93-416, see 1974 U.S. Code Cong. and Adm. News, p. 5341.

§ 8113. Limitations on right to receive compensation

(a) While an employee is receiving compensation under this subchapter, or if he has received a lump sum or compensation of fact,

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ment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except—

(1) in return for service actually performed;

(2) pension for service in the Army, Navy, or Air Force;

(3) other benefits administered by the Veterans' Administration unless such benefits are payable for the same injury or the same death; and

(4) retired pay, retirement pay, retainer pay, or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of title 5, United States Code.

However, eligibility for or receipt of benefits under subchapter III of chapter 83 of this title, or another retirement system for employees of the Government, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107 (c) of this title.

[See main volume for text of (b) and (c)]

As amended Pub. L. 93-416, § 9(a), Sept. 7, 1974, 88 Stat. 1145.

1974 Amendment. Subsec. (a) of Pub. L. 93-416 struck out "and" in cl. (1), substituted a semicolon for a period in cl. (2), and added cls. (3) and (4).

Effective Date of 1974 Amendment. Section 9(b) of Pub. L. 93-416 provided that: "The amendment made by this section [amending subsec. (a) of this section] shall be effective with respect to disability or death occurring before or after the date of enactment of this Act [Sept. 7, 1974] and without regard to any election under section 8110(b) of the Act [subsec. (b) of this section]; but no payment shall be made by reason of such amendment for any period prior to the date of enactment of this Act [Sept. 7, 1974]."

Legislative History. For legislative history and purpose of Pub. L. 93-416, see 1974 U.S. Code Cong. and Adm. News, p. 5341.

Supplementary Index to Notes

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1. Constitutionality

Neither section 2670 of Title 28 nor this chapter deprived plaintiff government employee, injured while acting in the scope of employment through negligence of another federal employee in driving a vehicle, of any preexisting common-law remedy against United States, for plaintiff government employee, suing United States, had not been deprived of due process of law by reason of provisions of section 2670 of Title 28 which barred his recovery on basis of common-law tort from both United States and negligent fellow employee. *Nash v. U. S.*, 611 F.2d 915, 50-1 U.S. 101, 399 U.S. 128, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

2. Construction

Where compensation acts, such as chapter 83, are liberally construed in accordance with legislative intent that humane purposes be accomplished. *Butman v. U. S.*, 611 F.2d 915, 50-1 U.S. 101, 399 U.S. 128, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

